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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUIS ADAN RAMIREZ, Defendant and Appellant.	G040419 (Super. Ct. No. 06SF1086) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed.

Law Offices of Robert C. Kasenow II and Robert C. Kasenow II for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Randall Einhorn and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Luis Adan Ramirez appeals from a judgment after a jury convicted him of second degree murder, child abuse and endangerment, and hit and run with permanent injury or death. Ramirez argues insufficient evidence supports his convictions for murder and child abuse and endangerment, the trial court erroneously failed to instruct the jury on corpus delicti, and the court erroneously sentenced him to the middle term of three years on the hit and run count. Although we agree there was instructional error, we conclude Ramirez was not prejudiced. None of his other contentions have merit, and we affirm the judgment.

FACTS

In April 2001, a complaint charged Ramirez with driving under the influence of alcohol and driving with a blood-alcohol level of 0.08 percent or more (Veh. Code, § 23152, subds. (a) & (b)), hit and run with property damage (Veh. Code, § 20002, subd. (a)), and driving without a valid license (Veh. Code, § 12500, subd. (a)). Ramirez pleaded guilty to driving under the influence of alcohol and driving with a blood-alcohol level of 0.08 percent or more. As part of his probation, Ramirez was required to attend the Mothers Against Drunk Driving (MADD) Victim Panel. He attended the program, part of which was in Spanish, in July 2001. At the program, an officer explained the applicable laws and the consequences of driving under the influence. The officer also explained, in graphic detail, the fatal accidents he had investigated during his career. Additionally, a mother explained how a person who had been convicted of driving under the influence three times killed her four-year-old son and his friend in a drunk driving accident.

Less than two years later, Ramirez again pleaded guilty to driving under the influence of alcohol and driving with a blood-alcohol level of 0.08 percent or more

(Veh. Code, § 23152, subds. (a) & (b)), and enhancements related to his April 2001 conviction (Veh. Code, § 23540). Three and one-half years later, Ramirez did it again.

One Sunday morning, Timothy Lysgaard went for a motorcycle ride on Ortega Highway—he was not under the influence of any drugs or alcohol. At approximately 11:30 a.m., motorcyclists on Ortega highway found Lysgaard on the ground, dead, in a pool of blood with his mangled motorcycle nearby. As one of the motorcyclists, Ricky Lee Mullins (Ricky Lee), directed traffic, his wife, Jo-Ella Mullins (Jo-Ella), a nurse and corrections counselor, went into the ravine because she saw a car. Jo-Ella saw a young girl, J.S., crying and pleading for someone to help her father, Carlos Santibanes. She saw Santibanes stumble from the car. She also saw another man, Ramirez, crawl from the car, grab a brown bag filled with beer cans, run to the side of the hill, throw the bag, and run. Jo-Ella yelled to Ricky Lee the man was running, and he pursued Ramirez and yelled in Spanish to stop, but he kept running. Motorcyclists saw Ramirez walking out of the bushes approximately one mile away. Ramirez stated he was in an accident and insisted he was searching for a level place to exit the ravine to get help. When officers arrived and said they were taking Ramirez back to the scene of the accident, he turned to the motorcyclists and in Spanish said, "'Thanks a lot, assholes.'" Officer Tom McCulloch determined Ramirez was under the influence of alcohol and arrested him. Approximately three hours later, Ramirez's blood was drawn for analysis.

Officer Juanita Salazar, a fluent Spanish speaker, went to the hospital where Ramirez, Santibanes, and his daughter were taken. While she was in the room, Ramirez and Santibanes discussed what they were going to tell the police. Salazar told the men she spoke Spanish and they stopped talking.

After Salazar advised Ramirez of his *Miranda*[1] rights in Spanish, she asked him what led to the accident. Ramirez said he lost control of the car, drove on the wrong side of the road, and hit a motorcyclist. He only "had a couple of beers" the morning of the accident. Ramirez admitted he knew Ortega Highway was a dangerous road and admitted he had two prior drunk driving convictions. When Salazar asked him whether he had attended drunk driving classes, he admitted he had and understood the dangers of driving under the influence. When she asked him why he did it again, he responded, "'because it came easy.'"

During a second recorded interview at the police station, Ramirez told Salazar his car was free from any mechanical problems. When Salazar asked him whether he learned anything at his program, he replied, "'I learned, but disgraceful.'"

An information charged Ramirez with murder (Pen. Code, § 187, subd. (a))[2] (count 1), child abuse and endangerment (§ 273a, subd. (a)) (count 2), hit and run with permanent injury or death (Veh. Code, § 20001, subds. (a), (b)(2)) (count 3), and driving under the influence causing great bodily injury (Veh. Code, § 23153, subd. (a)) (count 4). As to count 1, the information alleged Ramirez fled the scene pursuant to Vehicle Code section 20001, subdivision (c).[3]

At trial, the prosecutor offered Heather Lewis's testimony. Lewis, a forensic alcohol analyst, testified that at the time Ramirez's blood was drawn, his

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

[3] Before trial, on the prosecutor's motion, the trial court struck the enhancement as to count 1. At the close of evidence, on the prosecutor's motion, the court dismissed count 4.

blood-alcohol level was 0.197 percent. Based on Ramirez's physical characteristics and the amount of time between the accident and when his blood was drawn, Lewis opined Ramirez's blood-alcohol level was 0.23 percent at the time of the accident. Lewis explained it would take between eight and nine drinks for a person of Ramirez's weight to reach this blood-alcohol level and he would have been grossly impaired.

The prosecutor also offered the testimony of an accident reconstruction expert, Officer John Isbister. Isbister testified the car was out of control, crossed the center line, and struck the motorcycle head on.

The jury convicted Ramirez of all counts. The trial court sentenced Ramirez to a total prison terms of 15 years to life as follows: 15 years to life on count 1; a concurrent middle term of four years on count 2; and an imposed and stayed middle term of three years on count 3.

DISCUSSION

I. Corpus Delicti

A. Sufficiency of the Evidence

Ramirez argues insufficient evidence supports his murder conviction because there was no evidence establishing the corpus delicti of the crime. We disagree.

"'The elements of the corpus delicti are (1) the injury, loss or harm, and (2) the criminal agency that has caused the injury, loss or harm. [Citation.] "The independent proof may be by circumstantial evidence [citation], and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. [Citations.]" [Citation.] It is not necessary for the independent evidence to establish that the defendant was the perpetrator. [Citations.]' [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1127-1128; *People v. Ledesma* (2006) 39 Cal.4th 641, 721 [there need not be proof, independent of defendant's extrajudicial statements, that defendant was perpetrator of crime because corpus delicti rule does not apply to identity].)

"Distilled to its essence, the corpus delicti *rule* requires that the prosecution establish the corpus delicti of a crime by evidence independent of the defendant's extrajudicial inculpatory statements before he or she may be held to answer a criminal complaint following a preliminary examination, be convicted of an offense, or hear the statements repeated as evidence in court. [Citation.] The corpus delicti in turn consists of at least slight evidence that somebody committed a crime." (*People v. Ochoa* (1998) 19 Cal.4th 353, 450.) Here, there was sufficient evidence, independent of Ramirez's statements, establishing a crime was committed.

Isbister testified the car was out of control, crossed the center line, and struck the motorcycle. After the accident, Jo-Ella saw Ramirez climb out the car's passenger side and throw a brown bag full of beer cans over a cliff. There were between four and six tall malt liquor cans in the bag. Jo-Ella also saw Santibanes climb out of the car's passenger side suggesting that was the only way out of the car. As Ramirez ran away, there was evidence Jo-Ella yelled to Ricky Lee that the car's driver was running away. When Ricky Lee yelled he was a peace officer and to stop, Ramirez kept running. At the scene, McCulloch determined Ramirez was under the influence of alcohol. And there was evidence that at the time of the accident, Ramirez's blood-alcohol level was 0.23 percent, well above the legal limit. Although there was no evidence concerning Santibanes' blood-alcohol level, Jo-Ella, a nurse and peace officer, who had been formally trained in recognizing alcohol intoxication, testified he was intoxicated because there was a strong odor of alcohol emanating from him.[4] Based on this evidence, which goes well beyond the "slight" evidence required, the jury could reasonably infer a crime

[4] Ramirez notes there was also a child in the car but does not suggest she was driving. On appeal, he asserts Santibanes was driving. We note this was not his theory of the case at trial. During closing argument, defense counsel conceded Ramirez drove the car and was intoxicated.

was committed. (*People v. Martinez* (2007) 156 Cal.App.4th 851, 856 ["inference need not be the only inference or even the most compelling inference"].)

Finally, as we explain above, the corpus delicti rule does not require independent evidence the defendant was the perpetrator. Ramirez told Salazar his car was free from mechanical problems and after he drank a couple beers that morning, he drove the car that killed Lysgaard. The parties stipulated Ramirez had two prior convictions for driving under the influence, and in one of the instances, he was charged with leaving the scene of the accident.

Ramirez's reliance on *People v. Nelson* (1983) 140 Cal.App.3d Supp. 1, 4, is misplaced as there was evidence in that case only one of the two individuals in the car was intoxicated. Thus, there was sufficient evidence of the corpus delicti of the crime.

B. Jury Instruction

Ramirez claims the trial court erroneously failed to sua sponte instruct the jury with Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 359, "Corpus Delicti: Independent Evidence of a Charged Crime." The Attorney General concedes the error but argues Ramirez was not prejudiced. We agree with the Attorney General.

In *People v. Alvarez* (2002) 27 Cal.4th 1161, 1181 (*Alvarez*), the California Supreme Court held that when the prosecutor relies on a defendant's extrajudicial statements, the court must instruct the jury on the requirement of independent proof of corpus delicti. Here, the prosecutor did rely on Ramirez's statements, and the court erred in failing to instruct the jury with CALCRIM No. 359. However, we conclude the error was harmless.

"Error in omitting a corpus delicti instruction is considered harmless, and thus no basis for reversal, if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given. [Citations.] [¶] Of course, as we have seen, the modicum of necessary independent evidence of the corpus delicti, and thus the jury's duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be 'a slight or prima facie showing' permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues. [Citations.] If, as a matter of law, this 'slight or prima facie' showing was made, a rational jury, properly instructed, could not have found otherwise, and the omission of an independent-proof instruction is necessarily harmless." (*Alvarez, supra*, 27 Cal.4th at p. 1181.)

Here, there is no reasonable probability the jury would have reached a result more favorable to Ramirez had the trial court instructed the jury with CALCRIM No. 359. As we explain above in greater detail, there was abundant evidence independent of Ramirez's statements. There was evidence Ramirez was driving out of control, crossed into the other lane, and collided head on with Lysgaard, killing him. Independent witnesses saw Ramirez attempt to dispose of incriminating evidence and flee the scene of the crime on foot, despite an officer's order to stop. Additionally, the evidence demonstrated Ramirez's blood-alcohol level was well over the legal limit. Moreover, there was overwhelming evidence of implied malice murder. There was documentary evidence he suffered two prior convictions for driving under the influence of alcohol and that he attended a MADD program where he learned of the legal consequences of driving drunk and the devastating effect it can have on victims. Based on all the evidence presented at trial, we conclude no reasonable jury would have acquitted Ramirez of the charged offenses. The error was harmless.

II. Child Endangerment

Ramirez contends there was insufficient evidence of felony child abuse and endangerment because there was no evidence J.S. was under his care and custody. Specifically, he claims there was no evidence he assumed the responsibility of caring for J.S. and her father was in the car. Nonsense.

"'In reviewing a challenge to the sufficiency of evidence, the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment.' [Citation.] The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. Substantial evidence is 'evidence which is reasonable, credible, and of solid value.' [Citation.]" (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1083 (*Morales*).)

Section 273a, subdivision (a), makes it a crime for "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or *having the care or custody of any child,* willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered . . . ." (Italics added.)

"Section 273a does not require that a defendant be related to a child. . . . '[T]he relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all. "Care," as used in the statute, may be

evidenced by something less than an express agreement to assume the duties of a caregiver. That a person did undertake caregiving responsibilities may be shown by evidence of that person's conduct and the circumstances of the interaction between the defendant and the child; it need not be established by an affirmative expression of a willingness to do so.' [Citation.]" (*Morales, supra,* 168 Cal.App.4th at p. 1083.)

In *Morales, supra,* 168 Cal.App.4th at pages 1083-1084, the court concluded sufficient evidence supported his conviction for violating section 273a, subdivision (a), where defendant drove minor in a car and his conduct endangered her life. The court explained minor passenger could not leave defendant's speeding car, and she had no control over the vehicle. The court concluded, "The jury could reasonably conclude that in taking it upon himself to control [the minor's] environment and safety, defendant undertook caregiving responsibilities or assumed custody over her while she was in his car." (*Morales, supra,* 168 Cal.App.4th at p. 1084.)

Here, Ramirez states: "[T]he only facts that support the conclusion that [he] had 'care or custody' over the child was that the child was in a vehicle [he] was allegedly driving when [he] was under the influence of alcohol." He left out the part about his vehicle ending up 120 to 140 feet below Ortega Highway in a ravine. He assumed custody of her while he controlled the car. Enough said.

III. Sentence

Ramirez argues the trial court erroneously sentenced him on count 3 to the stayed middle term of three years when instead the court should have sentenced him to one-third of the middle term, or one year. The Attorney General argues the term on count 3 was proper because the court stayed the sentence on count 3 and did not impose a consecutive sentence. We agree with the Attorney General.

Section 1170.1, subdivision (a), states in relevant part: "The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of

imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." The trial court did not sentence Ramirez to a consecutive term on count 3, and therefore, he was not entitled to be sentenced to one-third of the middle term on that count.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.